

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON D. C., 20268-0001**

**Complaint of the Center
For Art and Mindfulness, Inc.
and Norton Hazel**

Docket No. C2015-1

**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF COMMISSION
ORDER OF CENTER FOR ART AND MINDFULNESS, INC. AND NORTON HAZEL**

**I. SUMMARY OF THE FEDERAL COURT ACTION AND THE AMENDED
COMPLAINT**

The Center for Art and Mindfulness, Inc. (“Art Center”) and Norton Hazel (“Hazel”) filed a five count Complaint against the United States Post Office, Patrick Donahoe, the Postmaster General, (“Donahoe”) and Louis R. Cappelli Family Limited Partnership III (“Cappelli”) regarding the sale process and precipitous closing of the Stamford, Connecticut downtown historic post office (the “Historic Stamford Post Office”) on September 20, 2013.¹ The activities surrounding the tainted sale process for the proposed sale of and the closing of the

¹ The USPS posted notices on the Historic Stamford Post Office on September 18, 2013 that it would close on September 20, 2013 without any written notice to its customers of the closing or public hearing as required under the provisions of 39 U.S.C. § 404(d) of the postal statutes when a post office is closed or consolidated as opposed to a relocation of the post office. That notice stated that the post office would close despite no replacement post office to relocate to. The notice posted on the building directed the postal mail box and other customers of the Historic Stamford Post Office to go to other existing postal facilities to collect their post office box mail or obtain the postal services they were used to obtaining in downtown Stamford. A copy of the Notice is still posted on the post office building states the post office has been discontinued. The Complainants filed an Amended Complaint only against the United States Postal Service, and not Mr. Donahoe or the Louis R. Cappelli Family Limited Partnership III as part of filing an Amended Complaint, which amendment was allowed by the PRC in Order No. 2377.

Historic Stamford Post Office took place between March, 2012 and December, 2014. The Historic Stamford Post Office is a post office listed on the National Registry of Historic Places.²

Previous to the filing of this Postal Regulatory Commission (“PRC”) Complaint on December 29, 2014, the Art Center and the National Post Office Collaborate, of Berkeley, California (“Plaintiffs”) filed a lawsuit in the Federal District Court of Connecticut in September, 2013 against the USPS and Donahoe (“Defendants”).³ In that case, the Plaintiffs’ obtained a temporary and permanent injunction against the Defendants, USPS and Donahoe, on September 26, 2013 and October 27, 2013 respectively, prohibiting the sale of the Historic Stamford Post Office until the Defendants’ complied with certain federal laws applicable to them.⁴ The Defendants’ filed a Motion to Dismiss two counts of the Federal Court complaint (Count III, Public Trust and Count IV discrimination under 39 U. S. C. § 403(c)) and prepared an Environmental Assessment (“EA”) as required by the National Environmental Policy Act (“NEPA”) regarding the proposed multiple use condominium/apartment and retail project that Cappelli proposed for the Historic Stamford Post Office site and land it owned adjacent to the post office. The Federal Court judge stayed any court decision regarding compliance with NEPA (Count I of the Complaint) and the National Historic Preservation Act (“NHPA”) (Count II of the Complaint) until the USPS completed an environmental assessment (“EA”) or full Environmental Impact Statement (“EIS”) as determined by the USPS and filed its findings from that report with the Court. The USPS filed its EA on March 18, 2014 with the Federal Court and the Defendants also claimed they had complied with the NHPA.

² The Historic Stamford Post Office has been listed on the National Registry of Historic Places since 1985 because of its architectural style (Italianate Renaissance style building) and historical significance as described in the Federal Court case permanent injunction Order dated October 28, 2014. See, Order of Federal District Court Issuing Preliminary Injunction. ECF Document No. 52 at page 39 in *National Post Office Collaborate et al. v. United States Postal Service et. al.*, 2013 WL 5818889. (the “Federal District Court Case”).

³ See Federal District Court case. *Id.*

⁴ See Order for Preliminary Injunction, Document No. 52, Federal District Court Case.

In May, 2014, the Court held a hearing on the Motion to Dismiss Counts III and IV of the Complaint. After the hearing on the Motion to Dismiss, the Federal Court held that Counts three and four of the complaint be dismissed. Count III (Public Trust) was dismissed for failing to state a cause of action and Count IV (Discrimination in USPS services under 39 U. S. C. § 403(c)) was dismissed because the Court lacked federal jurisdiction to hear the claim since it involved the issue of services of the post office for the PRC to decide.⁵ See, *LeMay v. U. S. Postal Service*, 450 F.3d 797, 800 (8th Cir. 2006). The dismissal was based upon the theory that Congress intended to remove consideration of any type of service complaints about the USPS from the Federal District Courts altogether, leaving these matters under the jurisdiction of the PRC.

Over the summer of 2014, the parties to the Federal Case agreed to a schedule to file cross motions for summary judgment on counts I and II of the Federal Second Amended Complaint. The Federal Court ruled on November 28, 2014 that the Defendants had complied with NEPA by its preparation of an EA and the NHPA. The Court held that the preparation of the EA was legally sufficient and that a full EIS (environmental impact statement) need not be prepared because the finding in the Defendants' EA that there was no significant environmental impact to the proposed Cappelli multi use project was not arbitrary and capricious.⁶ Neither Plaintiffs to the Federal Case appealed the final decision on summary judgment regarding the environmental impact count or historic preservation count of the complaint. The Federal Case holding on the environmental and historic preservation issues did not resolve any issues subject to the PRC Complaint filing in this action. None of the claims raised here were decided by the Federal Court. **The Federal Court held that it had no jurisdiction over the Art Center's**

⁵ See, Order regarding Motion to Dismiss of Defendants of Counts III and IV, ECF Document No. 129 at pages 8-9. Federal District Court Case.

⁶ See Order on Summary Judgment Cross Motions, *Federal* District Court Case. (ECF Document No. 136 at page 29).

Discrimination Count under 38 U.S.C. § 403(c) which was under the exclusive jurisdiction of the PRC⁷.

II. STANDARD FOR GRANTING OF MOTION FOR RECONSIDERATION.

The PRC must grant a Motion to Reconsider if there is newly discovered evidence, an error of law or fact in its decision or an intervening change of law that causes it to reverse its previous decision. See, *Max's Seafood Café v. Quinteros* 176 F.3d 669, 677 (3rd Cir. 1998). “The purpose of a motion for reconsideration is ‘to correct manifest errors of law or fact or to present newly discovered evidence.’” *Id.* at p.12. In this case, the PRC did not apply PRC and Third Circuit precedent that hold that the leasing of property is a non-postal service subject to its jurisdiction, contrary to the position taken in its Order No. 2377, which granted the USPS’s Motion to Dismiss in this case. See, *U. S. Postal Service v. Postal Regulatory Comm’n*, 599 F.3d 705, 709-11 (D.C. Cir 2010). In addition, the three other counts of the complaint (count two, conflict of interest, count three, breach of contract, and count four, violation of the real estate handbook rules) clearly embrace areas of PRC jurisdiction under 39 U. S. C. § 3662(a), 39 U. S. C. § 401(2) and existing precedent of the D. C. Circuit and the PRC. Further, the Order has factually incorrect information. The Order states that the Art Center’s Claims were ultimately dismissed by the Federal District Court on November 26, 2014, implying that all the counts were dismissed on the merits after an opportunity for consideration of the claims. Order at page 3. This is factually incorrect. The Complainant’s claim on discrimination was dismissed on jurisdictional grounds by the Federal District Court in September, 2014 based upon the PRC’s exclusive jurisdiction to hear the discrimination matter under its Complaint procedure, not on the merits of the claim. The Federal Court held it had no jurisdiction to hear that count. The Federal

⁷ See, Order on Motion to Dismiss of the Defendants, Federal District Court Case. (ECF Document No. 129 at pages 8-9).

Court refused to allow an amendment to the Second Amended Complaint to hear the breach of contract claim.⁸ The two counts on conflict of interest and violation of handbook rules were never in the Federal Case and the Federal Court voluntarily dismissed Count Five about closing the Historic Stamford Post Office as a matter to be determined by an appeal to the PRC. The PRC Order has factual errors about the status and posture of the claims in the case before the Federal Court. Therefore, reconsideration and a reversal of Dismissal of the Amended Complaint is required to correct manifest errors of law and the factual errors in the PRC's Order No. 2377. The Complainants intend to refile an appeal of the suspension of service at the Historic Downtown Stamford Post office in Docket No. A-2014-1, which was previously dismissed without prejudice.

III. LEGAL ARGUMENT. THE PRC HAS MADE AN ERROR OF LAW AND MADE FACTUAL ERRORS IN FINDING THAT IT HAS NO JURISDICTION OVER THE AMENDED COMPLAINT.

The PRC clearly has jurisdiction to review any claim of discrimination under 39 U.S.C. § 403(c) and the related breach of contract claim, because section 403(c) is specifically mentioned in 39 U.S.C. § 3662(a) as a subject of jurisdiction of the PRC. The statute does not limit the review to postal service complaints, the review is broad and encompasses all types of service complaints against the USPS, not just postal service complaints.⁹ In its order denying it has jurisdiction over this discrimination claim, the first count of the Amended Complaint, and the breach of contract complaint, the third count of the Amended Complaint, the PRC relies upon the case of *U. S. Postal Service v. Postal Regulatory Comm'n*, 599 F3d. at 705,708 (D. C. Cir 2010)

⁸ Federal District Court Case, Order on Motion to Dismiss, *Id.* at pages 11-13.

⁹ See, 39 U. S. C. §§ 3662(a) and 403(c).

and the decision of the PRC in its Order No. 154 in the proceeding at MC 2008-1. The *U. S. Postal Service* case does not hold that the PRC has no jurisdiction over any claim relating to the sale or purchase of real estate. In the *U. S. Postal Service* case, the USPS filed an action against the PRC alleging that the PRC had abused its regulatory authority by ruling that the provision of certain non-postal services offered by the USPS were activities that the PRC had the power to order the USPS to terminate and cease providing. The specific services involved were stamps issue for collectors and the leasing of intellectual property. The D. C. Circuit Court in *U. S. Postal Service* held that the provision of stamps for collecting and the leasing of intellectual property were nonpostal services within the jurisdiction of the PRC to review. *Id.* at pages 710-11. The D. C. Circuit specifically rejected any category of postal activity that was categorized as “not nonpostal”, as suggested by the USPS in that case and also rejected that activities under general statutory authority elsewhere in Title 39 statutes, such as the leasing of property were something other than nonpostal services. *Id.* at 708.

As part of the enactment by Congress of the Postal Accountability and Enhancement Act of 2006 (“PAEA”), Congress gave the PRC the specific delegated power “to review and cause the USPS to terminate non-postal services” if it administratively followed the Congressional criteria to order such termination. The D. C. Circuit Court of Appeals in the *U. S. Postal Service* case held that the PRC was following the directive from Congress by statute to review and cause the USPS to terminate nonessential non postal service activities that were not core services necessary to delivering the mail. The decision by the D.C. Court of Appeals in no way limits the jurisdiction of the PRC with respect to leasing, buying or selling real estate. That court held that the PRC has jurisdiction to review leasing of property as a nonpostal service offered by the USPS. The case stands for the proposition that where Congress has made PRC jurisdiction clear,

the PRC is required to act upon it, which is what the PRC did in that case. The case cited does not stand for limiting the PRC's jurisdiction in any way with respect to a national program to consolidate the post office and sell off its surplus historic buildings. The PRC's order violates the clear holding of the D.C. Circuit Court of Appeals in the *U. S. Postal Service* case. This failure to exercise its clear jurisdiction to prevent discrimination and a breach of contract in any non-postal services offered by the USPS, even those involving the sale and purchase of historic buildings, constitutes an error of law in the exercise of its jurisdiction and the PRC should therefore reverse its order that is inconsistent with this precedent and allow discovery and an investigation into this historic post office sale.

The PRC further relies upon its administrative proceeding to implement 39 U. S. C. § 404(e) of the PAEA, which required the PRC to review all non-postal services provided by the USPS at the date of enactment of the PAEA to determine whether such services should be discontinued considering the public need for the service and the private sector's ability to provide such services, to refrain from exercising its jurisdiction in this case. See, Docket No. MC2008-1 Review of Nonpostal Services Under the Postal Accountability and Enhancement Act December 19, 2008, at p. 1. ("MC 2008-1 Proceeding").

In the MC 2008-1 Proceeding, the PRC set up a framework for determining what was a non-postal service subject to its review. The postal statutes define non postal services to mean "any service that is not a postal service defined in 39 U. S. C. § 102(5)." MC 2008-1 Proceeding at page 1. The PRC went on to state that "Thus by definition, only two types of services are provided by the Postal Service: those that are postal services and those that are nonpostal services" Id. at page 1. The PRC specifically rejected the efforts of the USPS to cast necessary activities of the USPS such as buying and selling and leasing real estate as "not nonpostal

services”. *Id.* at page 57 (The USPS argued that activities arising from specific statutory grants were not even a service or were “not non postal services”. The PRC rejected this argument in the MC 2008-1 Proceeding and should also reject it here).

Thus, USPS activity was divided into postal services and non-postal services and nothing else. The PRC concluded that a service is “(1) an ongoing activity, (2) of a commercial nature, (3) offered to the public, (4) for purposes of financial gain” MC 2008-1 Proceeding at page 2. The purchase and sale of surplus historic real estate property over a multi-year program to downsize, consolidate and streamline the USPS is not a sporadic or ad hoc sale of surplus property as the sale of properties was described by Postmaster General Donahoe in the MC 2008-1 Proceeding. *Id.* at page 66.¹⁰ The sale of surplus buildings and land is clearly a non-postal service that is an ongoing commercial activity, offered to the public for purposes of financial gain and is now a significant part of the USPS’s non postal activities and subject to review by the PRC, with its jurisdiction based upon 39 U. S. C. §§ 403 (c) and 3662(a).

Finally, the decision of the PRC to grant the Motion to Dismiss in this case violates its own precedent in the Complaint of Capital One Services, Inc., Docket No. C2008-3 in which the PRC held that Capital One Bank’s complaint that it was discriminated in regard to postal services and was entitled to a complaint investigation and discovery when the USPS refused to

¹⁰ The 2014 Report on Form 10-K of the USPS for the fiscal year ended September 30, 2014 has a line item within the financial statements of all property and equipment sold of \$ 129 million as of September 30, 2014, \$158 million as of September 30, 2013 and \$148 million as of September 30, 2012. See, U. S. Postal Service 2014 Report on Form 10-K at page 45. Property and equipment held for sale at September 30, 2013 was \$ 78 million, \$111 million for September 30, 2012 and \$11 million for September 30, 2011. See, U. S. Postal Service 2013 Report on Form 10-k at page 91. These numbers support the fact that the building and land sales activity of the USPS is performed to generate revenue as the test of what is a nonpostal activity in the MC 2008-1 Proceeding. At September 30, 2014 the net gain from sale of property and equipment was \$ 11 million, for the year ended September 30, 2013 \$ 14 million, and \$ 79 million for the year ended September 30, 2012. This indicates that the building and land sales are not yielding much more than the book cost of the asset on sale, but it is annually providing “financial gain”. See 2014 Form 10-K at page 53.

Compare this to the statement of Post Master Donahoe at page 66 of the MC 2008-1 Proceeding that the activity was ad hoc and sporadic.

allow Capital One Bank to access the same terms of postal services provided to a competitor, Bank of American. *See*, PRC Order No. 92 at 4. The PRC Order in this case made no mention of this Complaint proceeding in which the PRC found both factual and legal bases to warrant an investigation and discovery, thus denying a Motion to Dismiss for service complaints regarding the USPS. The D. C. Court of Appeals case law does not limit the review jurisdiction of the PRC to just postal services; it extends to non-postal services as well.

The PRC decision on the Motion to Dismiss also ignores and does not discuss the 39 U. S. C. §3662(a) jurisdictional base of Counts II-IV of the Amended Complaint. The Amended Complaint was significant in this regard by its addition of other important statutory bases for jurisdiction of the PRC in this case when read in conjunction with 39 U. S. C. § 3662(a) ([USPS actions] “not in compliance... with this chapter (or regulations promulgated under any of these provisions) [and any person] may lodge a complaint with the Commission in such form or manner as the Commission may prescribe”).

The statute mentioned above enumerates five specific statutory parts of Title 39 relating to the USPS that are a basis for jurisdiction by the PRC, but it also has a sixth category of jurisdiction that the PRC has overlooked in its decision to dismiss the Amended Complaint. The PRC must exercise jurisdiction whenever the USPS is “not in compliance... with this chapter (or regulations promulgated under any of these provisions), [and a person] may lodge a complaint with the PRC in such form or matter as the PRC may prescribe.” Essentially, one of the jurisdictional authorities granted to the PRC is to enforce the compliance of the USPS to operate within the confines and restrictions and rules set forth in Title 39 and under the regulations adopted, repealed or modified under those statutory provisions. *See*, 39 U. S. C. § 401(2).¹¹ *See*,

¹¹ 39 U.S. C. § 401 states to: “(2) to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be

Richter v. U. S. Postal Service, Civ. No. 8;14CV71, D. Nebr 2014) (“The Postal Regulatory PRC has exclusive jurisdiction to hear complaints regarding postal rules and regulations **within USPS’s statutory functions**, (emphasis added) and certain other matters 39 U. S. C. §§401(2), 3662(a).”) When a party raises a material issue of fact and law about the conduct of the USPS, the PRC must allow discovery and investigate the matter as in this case. This case involves a civil matter and dispute over service complaints about the way the USPS operates its non-postal services in conducting its operations. The Federal Court would not hear these claims, deferring to the primary and exclusive jurisdiction of the PRC to first review this matter, subject to appellate review by the D. C. Court of Appeals.¹² Yet the PRC is not taking on the responsibility of the jurisdiction clearly delegated to it under the PAEA of 2006. This provision is an additional basis for jurisdiction for Count II (Conflicts of Interest) and Count IV (Violation of Real Estate Handbook) of the Amended Complaint.

The PRC also has the power to enforce all provisions of title 18 dealing with the postal service or officers or employees of the U. S. Government, including statutes involving the conflicts of interest of USPS employees. 39 U.S.C. § 410(b) (2) and Chapter 73 of Title V with respect to the conduct of postal service employees. This statute along with the clause in 38 U. S. C. § 3662(a) cited above (“not in compliance... with this chapter (or regulations promulgated under any of these provisions), [and any person] may lodge a complaint with the PRC in such form or matter as the PRC may prescribe.”) are the jurisdictional basis for the PRC review of Claim II, Conflict of Interest, under the Amended Complaint.

assigned to the Postal Service under any provisions of law outside of this title;”. By failing to allow an investigation and discovery of an administrative complaint over the provisions of Title 39 relating to discrimination, potential conflict of interests of personnel and violation of the USPS Real Estate Handbook, the PRC is in effect adopting an adjudicatory administrative rule that violates Title 39 and Title 5 statutes and regulations applicable to the USPS by refusing to exercise the jurisdiction clearly delegated to it.

¹² See, 39 U. S. C. § 3663.

Count III involves an issue of Breach of Contract resulting in the breach of the Art Center purchase contract from the undue preference granted to the Cappelli III purchaser (favorable terms and timing of purchase of the property) and undue discrimination against the Art Center in its September, 2012 purchase agreement (unfavorable terms and short time from signing purchase agreement to closing). The basis for this claim's jurisdiction is also 39 U. S. C. §§ 403(c) and 3662(a) as a nonpostal service complaint that falls into the category of nonpostal services established by the PRC in its MC 2008-1 Proceeding. The appellate courts have made it clear that claims that are essentially service complaints that echo in contract are still under PRC jurisdiction. *See, LeMay*, 450 F.3d at 801, *See also, Murphy v. U. S. Postal Serv.*, 2014 WL 4437731 (N. D. Cal. 2014 at page 6. The PRC made it clear in the MC 2008-1 Proceeding that there was only two categories of postal service activities that were mutually exclusive, those that were postal in nature and those that were nonpostal services. *Id* at page 9. The USPS proposed a third category of "not non postal" services, which the PRC and the D. C. Court of Appeals rejected as an intellectual stretch in interpretation of the applicable postal service statute. *See*, MC-2008-01 Proceeding at page 57, and *U. S. Postal Service* at page 78.¹³

The PRC also has clear jurisdiction over violations of the USPS Handbook procedures to obtain the best value for its real estate sales. *See, AT & T v. U. S. Postal Service*, 21 F Supp. 2d 811 (ND Ill. 1997) at pages 812 and 816 (the violation of a UPS Procurement Manual

¹³ In *Lepage 2000 Inc. v. PRC* 642 F. 3d 225, 345 U.S. App D.C. (D. C. Cir. 2011), the D. C. Court of Appeals remonstrated the PRC when it held third party mailing and shipping service licensing of its intellectual property as a non-postal service must be discontinued by the USPS. The Appellate Court found that the PRC's Order was rife with anomalies, all of which considered together demonstrated that the PRC was proceeding in a slap dash manner. The D.C Circuit Court reviewed the petition, vacated that PRC order and remanded the matter for further proceedings by the PRC. Subsequently, the Court of Appeals granted in part the Petitioner's petition for legal fees in the amount of \$102,664.73 under the Access to Justice Act since the legal position of the PRC was not "substantially justified" under that attorney's fees statute.

requirement for competitive bidding survives a motion to dismiss and there is jurisdiction to hear the complaint).

The Complainants shall not review Count V here, but will instead file an appeal of the suspension of the post office closing as provided for in Docket No. A-2014-1.¹⁴

Respectfully submitted,

April 1, 2015

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¹⁴ Complainants argue that the appeal of the closure of the Historic Stamford Post Office is not moot. The PRC must outline the parameters of the use of the “emergency suspension” statute and regulations so that the USPS does not use the procedure in cases that are not legally sufficient to constitute an emergency suspension situation as is the case with the historic Stamford Post Office. This practice circumvents the notice to customers and public hearing requirement whenever a post office is discontinued or consolidated. 39 U. S. C. § 404(d) (2) (A) and 39 C.F.R. § 241.3. Since most emergency suspension matters are completed within ninety days, this is an exception to mootness as a matter that is capable of repetition yet evading review. Rarely will a case like this be completed even at the PRC level within the time frame of an emergency suspension of a post office. As such, the PRC must decide this issue. See, *Strickland v. Alexander*, 772 F. 3d 876, 877 (11th Cir. 2014) (due process constitutional challenge to state garnishment proceeding, mootness exception for matters capable of repetition, yet evading review), see also, *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (Su. Ct. 1973) (abortion decision- “Pregnancy provides a classic justification for a conclusion of nonmootness. It truly is capable of repetition, yet evading review”.) *Id* U. S. at 125, 93 S. Ct. at ___, 35 L. Ed. 2d at _____. At the time of this filing the USPS has not even started the build out of the new location on Summer Street in Stamford.